90-202

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MOBIL LAND DEVELOPMENT CORPORATION,
Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the specific requirements of Fed.R.Civ.P. 4 for service of original process be disregarded, and are federal courts accordingly empowered to exercise *in personam* jurisdiction over a nonconsenting corporate defendant which has not been served directly, based solely upon that defendant's awareness of the litigation and the fact that its wholly-owned subsidiary was served and appeared as a defendant in the litigation?

PARTIES IN THE COURT OF APPEALS

The parties below were Colonial Village, Inc. and Mobil Land Development Corporation, the defendants in Civil Action No. 86-2917 in the district court and appellees in No. 88-7257 in the court of appeals; Marvin J. Gerstin and Marvin Gerstin Associates, Inc., defendants in Civil Action No. 86-3196 and appellees in the consolidated case in the court of appeals, No. 88-7260; and Girardeau Spann, the Metropolitan Washington Planning and Housing Association, Inc., and the Fair Housing Council of Greater Washington, plaintiffs in both district court cases and appellants in both court of appeals cases.

Petitioner Mobil Land Development Corporation is a wholly-owned subsidiary of the Mobil Corporation, a publicly-held corporation, and it owns all of the stock of Colonial Village, Inc.

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Respondents.

Mobil Land Development Corporation petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals, reproduced in the separately-bound appendix, App. A at pages 1a-21a, is reported at 899 F.2d 24. The May 22, 1987 opinion of the district court is reported at 662 F.Supp. 541 and reproduced at App. F, pp. 29a-41a, and its October 13, 1988 opinion is reported at 124 F.R.D. 1 and reproduced at App. H, pp. 45a-49a.

JURISDICTION OF THIS COURT

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The judgment of the court of appeals was entered on March 13, 1990, and rehearing was denied on May 3, 1990.

STATUTORY PROVISIONS AND RULES INVOLVED

Section 804(c) of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3604(c), as amended, makes it unlawful:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Section 812(a) of the Fair Housing Act, in effect at the time the original complaint was filed and codified at 42 U.S.C. §3612(a), provided in relevant part as follows:[1]

> The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction.

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[1] The provisions of section 812 were amended by section 8(2) of the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1633, and replaced by a new section 813, now codified at 42 U.S.C. §3613, which became effective on March 12, 1989. *See* Pub. L. 100-430, sec. 13(a); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990).

Rule 4 of the Federal Rules of Civil Procedure, as amended by section 2 of the Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. 97-462, 96 Stat. 2527 (Jan. 12, 1983), provides in relevant part as follows:

> **(a) Summons: Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.
>
> **(b) Same: Form.** The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. . . .
>
> **(c) Service.** * * *
>
> (2) * * *
>
> (C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

* * *

(d) Summons and Complaint: Person to be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * *

(3) Upon a domestic or foreign corporation. . ., by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is

one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

* * *

(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. . . . Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. . . .

* * *

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service

> was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

STATEMENT OF THE CASE

Respondents Girardeau Spann, *et al.* ("plaintiffs") filed suit against petitioner Mobil Land Development Corporation ("MLDC") and its wholly-owned subsidiary Colonial Village, Inc. ("Colonial") in the United States District Court for the District of Columbia on October 23, 1986, invoking federal subject matter jurisdiction under 28 U.S.C. §§1331, 1337, 1343(4) [*sic*], 2201 and 42 U.S.C. §3612. The complaint alleged that MLDC and Colonial were engaged in racially preferential and discriminatory advertising for the Colonial Village residential condominiums in Arlington, Virginia, and it sought damages, equitable and declaratory relief under the Fair Housing Act, 42 U.S.C. §§3604, 3612, and the Civil Rights Act of 1866, 42 U.S.C. §§1981, 1982.

On November 6, 1986, the plaintiffs obtained a summons directed to Colonial from the clerk of the district court. This summons, a copy of the complaint and a properly completed and verified Form 18-A ("Notice and Acknowledgment for Service by Mail"), naming Colonial as the "person to be served" in accordance with Fed. R. Civ. P. 4(c)(2)(C)(ii), were mailed to counsel for Colonial on November 10, 1986.[2] By arrangement with plaintiffs' counsel, and with his

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[2] Form 18-A was prescribed by Congress in section 3 of the Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. 97-462 (Jan. 12, 1983).

client's authorization, Colonial's attorney executed the acknowledgment of service form on behalf of Colonial and returned it to plaintiffs' counsel on November 14, 1986, thereby completing service of process on Colonial pursuant to Rule 4(c)(2)(C)(ii).[3] (App. I, 55a). On December 9, 1986, plaintiffs filed the Form 18-A in the district court as proof of service on Colonial, although Colonial by that time had already answered the complaint. Colonial thereafter filed a dispositive motion on February 24, 1987.

On March 3, 1987, plaintiffs filed a purported proof of service by personal delivery to MLDC in New York. Three days later, MLDC appeared specially and moved the district court to dismiss the action pursuant to Fed. R. Civ. P. 4(j) for failure to make service of process upon it within 120 days, or to quash the out-of-state service as improper and unauthorized. That motion and a supporting affidavit by Dennis H. Bloomquist, then the general counsel of MLDC, demonstrated that service had not been accomplished under Rule 4 procedures and could not be accomplished under District of Columbia long-arm provisions because of MLDC's lack of relevant contacts with that forum. (App. I, 53a).

The Bloomquist affidavit, which plaintiffs made no effort to traverse, established that MLDC was a Delaware corporation, having its principal place of business in New York (subsequently moved to Virginia in

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[3] Colonial's attorney was also asked by plaintiffs' counsel if he would accept service of process for MLDC. He declined to do so because MLDC had not authorized him to receive service on its behalf. Consequently, no summons or Form 18-A directed to MLDC was ever sent to the attorney for Colonial. (App. I, 54a-55a).

1989), with no place of business and no agents or employees in the District of Columbia; that MLDC did not have an interest in, use or possess real property nor regularly transact or solicit business in the District of Columbia, and was not qualified to do business there; that MLDC did not engage in any meetings or activities in the District of Columbia relating to the subject matter of the complaint; and that MLDC did not own or manage the Colonial Village condominium development in Virginia and had no involvement in the advertising for that project. (App. I, 53a). The affidavit in addition established that Colonial was a separate Delaware corporation, having its own distinct board of directors and officers who were responsible for Colonial's management and operation. (App. I, 54a). None of this was disputed.

In response to MLDC's motion, plaintiffs argued that they had attempted to serve MLDC four times, once by mail to a Virginia address pursuant to Fed.R.Civ.P. 4(c)(2)(C)(ii), twice by mail to New York under the same rule, and once by hand delivery in New York. Although the Form 18-A acknowledgement of receipt forms were not signed and returned, plaintiffs contended that these efforts were sufficient under the federal rules or the District of Columbia long-arm statute. Plaintiffs urged that MLDC should not be permitted to refuse to acknowledge out-of-state service, despite its lack of contacts with the District of Columbia and the absence of any legal basis for making such service.

The district court on May 22, 1987, granted summary judgment in favor of Colonial on the Fair Housing Act claims, holding that "there was no conceivable violation . . . during any period not barred by the

statute of limitations." (App. F, 39a). The claims under §§1981 and 1982 were dismissed for failure to state a claim upon which relief could be granted. (App. F, 41a). The district court, however, did not deal with the Rule 4(j) motion of MLDC.

After an initial appeal by plaintiffs was dismissed for lack of a final order under Fed.R.Civ.P. 54(b) and 28 U.S.C. §1291, the district court addressed MLDC's motion to dismiss in a memorandum and order issued on October 13, 1988. Noting that there is no federal statute or rule generally authorizing extraterritorial service in actions under the 1866 Civil Rights Act or the Fair Housing Act, the district court agreed with MLDC that all of plaintiffs' attempts to accomplish out-of-state service by mail and personal delivery to MLDC were ineffective, but nonetheless denied its Rule 4(j) motion. (App. H, 47a-48a). The court held that service of process directly on MLDC was not actually required to obtain jurisdiction:

> [MLDC] concedes that service was effective on Colonial Village, Inc., its wholly-owned subsidiary. Plaintiffs contend that since Colonial Village holds itself out to the public as "a Mobil company," that service on it effected service on [MLDC]. They are correct.
> * * *
>
> It is quite obvious that the parent company [MLDC] had actual notice of this action, as it concedes at this point. Consequently, service was properly effected on [MLDC].

(App. H, 47a-48a). Thus, because "the proper service made on MLDC's co-defendant and wholly-owned subsidiary, Colonial Village, sufficed to draw in MLDC

as well" (App. A, 17a), compliance with Rule 4 as to MLDC was found to have been wholly unnecessary. On that basis, MLDC's Rule 4(j) motion to dismiss or quash service of process was denied by the district court. (App. H, 47a-48a).

In response to plaintiffs' appeal on the merits, MLDC argued that dismissal of the case should be affirmed as to it, first because proper service of process had not been made, and second, because MLDC lacked sufficient minimum contacts with the forum to sustain jurisdiction under *International Shoe Corporation v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), and its progeny. Plaintiffs elected not to respond to these points, asserting that they could only be raised by means of a cross-appeal.[4] Initially the court of appeals refused to consider the issue of personal jurisdiction, on grounds that MLDC had not taken a cross-appeal, but later reconsidered and ruled that the service of process and minimum contacts issues had not been waived and were properly before it. (App. A, 15a-16a).

On the merits, the court of appeals on March 13, 1990 reversed the district court's award of summary judgment for Colonial on the Fair Housing Act claims and affirmed its dismissal of the §§1981 and 1982 claims. (App. A, 18a-21a). On the issue of MLDC's contacts with the forum, it found the "thin materials" in the record inadequate for intelligent appellate review—ignoring the undisputed Bloomquist affidavit and the rule that plaintiffs have the burden to es-

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[4] Plaintiffs did not appeal the district court's determination that none of their efforts to make service directly on MLDC in Virginia and New York had been effective.

tablish a sufficient basis for personal jurisdiction[5]—and remanded "for further airing". (App. A, 17a-18a). The district court's holding that service of process on Colonial could suffice as a matter of law to bring MLDC before the court was left standing, albeit with a suggestion that additional development of the factual record would be appropriate to determine the propriety in this case of having served Colonial as an agent for MLDC. (App. A, 18a).

* * *

It is petitioner's contention that, absent waiver or consent to jurisdiction, service of process in compliance with the specific and detailed requirements of Fed.R.Civ.P. 4 is a threshold prerequisite for federal courts to assert *in personam* jurisdiction over any defendant. Failure to make such service within 120 days compels dismissal under Rule 4(j), absent a showing of good cause. Since Rule 4 contains no provision for substituted or "subsidiary" service, as allowed by the district court, the court of appeals should have required that the complaint against MLDC be dismissed in accordance with Rule 4(j). By failing to order dismissal and allowing the district court's legally incorrect ruling on service of process to stand, the court of appeals ignored a fundamental limitation on federal jurisdiction.

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[5] See *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir. 1988); *Brown v. Flowers Industries, Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983); *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 904 (1st Cir. 1980); 4A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL §1083, at 12 (1987).

REASONS FOR GRANTING THE WRIT

THE LOWER COURTS' RULINGS CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS ON AN IMPORTANT ISSUE OF FEDERAL JURISDICTION, AND THEIR ASSERTION OF IN PERSONAM JURISDICTION OVER A DEFENDANT NOT SERVED IN COMPLIANCE WITH RULE 4 REPRESENTS A DEPARTURE FROM ACCEPTED PRACTICE WARRANTING EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Correctly ruling that plaintiffs' three efforts to obtain out-of-state service of process by mail and one effort by personal delivery were unavailing, the district court then erroneously proceeded to hold that service on MLDC was not necessary in the first place. This attempt to soften the consequences of plaintiffs' inability to obtain service of summons conforming to the Federal Rules of Civil Procedure has created significant confusion as to how and when federal courts may assert their powers over a defendant. The court of appeals, evidently impatient with what it viewed as a merely technical hindrance to the federal jurisdiction necessary to adjudicate plaintiffs' civil rights test case against MLDC in this forum, made matters worse by failing to correct the district court's error.

In *Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987), the Court emphasized that service of process in accordance with the governing rules is the only means by which federal courts may assert compulsory jurisdiction over any defendant:

> Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied. . . . [T]here must be more than no-

> tice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

Id., 484 U.S. at 104; *accord, Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445, 90 L.Ed. 185, 66 S.Ct. 242 (1946) ("service of process is the procedure by which a court having venue and jurisdiction of the subject matter . . . asserts jurisdiction over the person of the party served"); *Robertson v. Railroad Labor Board*, 268 U.S. 619, 622-623, 69 L.Ed. 1119, 1121-1122, 45 S.Ct. 621 (1925) ("defendant in a civil suit can be subjected to [district court] jurisdiction in personam only by service" of the writ of summons); *Cohen v. Newsweek, Inc.*, 312 F.2d 76, 77 (8th Cir. 1963) ("service goes directly to the question of jurisdiction of the court.").[6]

Virtually all other federal appellate courts have agreed that service in accordance with the federal rules is a prerequisite to exercise of federal jurisdiction over a non-consenting defendant. *Echevarria-Gonzales v. Gonzales-Chapel*, 849 F.2d 24, 28 (1st Cir. 1988); *Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1303(2d Cir. 1990); *Stranahan Gear Co. v. NL Industries, Inc.*, 800 F. 2d 53, 56-58 (3rd Cir. 1986);

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[6] The issue of whether notice of litigation given under *state* long arm and service of process rules is constitutionally sufficient is not involved in this case. See, *e.g., Burnham v. Superior Court of California*, 109 L.Ed.2d 631, 110 S.Ct. 2105 (1990); *Mennonite Board of Mission v. Adams*, 462 U.S. 791, 77 L.Ed.2d 180, 103 S. Ct. 2706 (1983).

Armco, Inc. v. Penrod-Stauffer Building Systems, Inc., 733 F.2d 1087, 1089 (4th Cir. 1984); *Way v. Mueller Brass Co.*, 840 F.2d 303 (5th Cir. 1988); *Ecclesiastical Order of the Ism of Am, Inc. v. Chasin*, 845 F.2d 113, 116 (6th Cir. 1988); *Tryforos v. Icarian Development Co., S.A.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied, sub nom. Manta v. Tryforos*, 423 U.S. 1091 (1976); *Sieg v. Karnes*, 693 F.2d 803 (8th Cir. 1982); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982); *Hutchinson v. United States*, 677 F.2d 1322, 1328 (9th Cir. 1982); *Varnes v. Local 91, Glass Bottle Blowers Assoc.*, 674 F.2d 1365, 1368-1369 (11th Cir. 1982). Indeed, prior to its decision in the instant case the District of Columbia Circuit had itself emphasized the necessity of service of process in strict accordance with Rule 4 in order to exercise personal jurisdiction. *Combs v. Nick Garin Trucking*, 825 F.2d 437, 442-443 (D.C. Cir. 1987).

There is no dispute that in some circumstances a subsidiary corporation may be deemed an agent of its parent for service of process under Fed.R.Civ.P. 4(d)(3). But such agency is only a secondary issue which need not be resolved in this case. Even assuming that discovery on remand could somehow show Colonial to have been an agent of MLDC in fact or by operation of law, more fundamental defects in the form and service of process still would preclude any assertion of personal jurisdiction over MLDC.

For example, both the proof of service and the Form 18-A which plaintiffs filed in December, 1986, show on their face that Colonial was served only for itself and not as agent for MLDC. That service was not made directly upon Colonial but, by special arrangement, was sent to and received by Colonial's

outside attorney, who specifically informed plaintiffs that he was not authorized to receive service of process for MLDC. (App. I, 54a). Thus the service cannot have been valid as to MLDC under Fed.R.Civ.P. 4(d)(3), which specifies how service may be made on a corporate defendant. The fact that no Form 18-A acknowledgement was returned on behalf of MLDC also prevents the service through Colonial's attorney from being effective as to MLDC under Fed.R.Civ.P. 4(c)(2)(C)(ii).

Fed.R.Civ.P. 4(b) specifies the form of the summons to be served, which must "be directed to the defendant," must state the time within which "the defendant" must appear and defend, and must notify "the defendant" that judgment by default will be entered against it, if it fails to do so. Obviously the words "the defendant" in this context must refer to the particular party sought to be brought within the court's jurisdiction, not some other defendant in the case. The only summons served on Colonial was its own—*not* one directed to MLDC or purporting to notify MLDC of the important matters set out in Rule 4(b). This could not be regarded as an insubstantial or merely technical deficiency in the form of the summons, but goes to the essence of the summons. *See Gianna Enterprises v. Miss World (Jersey) Ltd.*, 551 F.Supp. 1348, 1358 (S.D. N.Y., 1982) (failure of unsigned and unsealed summons to comply with Rule 4(b) warrants quashing of service); *LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400, 1414 (E.D. Va. 1988) (incorrect name of defendant shown on summons is material defect and renders service invalid). This Court has also emphasized in recent cases that incorrect or incomplete specification of parties in ac-

cordance with governing procedural rules is material and may be fatal to the right of action or appeal. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 101 L.Ed.2d 285, 108 S.Ct. 2405 (1988) (failure to specify name of appellant in notice was jurisdictional bar to his appeal); *Schiavone v. Fortune*, 477 U.S. 21, 91 L.Ed.2d 18, 106 S.Ct. 2379 (1986) (failure to name correct defendant in complaint prior to expiration of limitations period required dismissal of action). The prejudicial effect of the misnomers on the summons and Form 18-A is demonstrated by the uncontroverted evidence that Colonial's attorney would not have accepted service had those papers indicated that the service was intended for MLDC as well as Colonial. (App. I, 55a).

The situation here is closely analogous to the facts in *Gottlieb v. Sandia American Corp.*, 452 F.2d 510 (3rd Cir.), *cert. denied, sub nom. Wechsler v. Gottlieb*, 404 U.S. 938 (1971). In that case, efforts to serve the defendant corporation directly had been ineffectual, and service on a controlling shareholder and negotiating agent for the corporation was held insufficient, because the person served "was not served as an agent of the corporation, but as an individual defendant." *Id.*, 452 F.2d at 514. That is also what happened here, but with the opposite outcome. The D.C. Circuit's and the district court's decisions to disregard all deficiencies in the summons and service as to MLDC are squarely in conflict with the Third Circuit's decision in *Gottlieb*.

In *LeDonne v. Gulf Air, Inc., supra*, decided only a month after the district court's service of process ruling in this case, the district court for the Eastern District of Virginia dealt with an agent-service ar-

gument identical to that applied by the district court here, but with opposite result. In that case, seeking enforcement of an Illinois state court default judgment against a foreign airline, the plaintiff claimed that service had been accomplished on the airline in accordance with the Foreign Sovereign Immunities Act, 28 U.S.C. §1608(b)(2), through service of the summons and complaint on a corporate co-defendant as the airline's putative agent. This contention was rejected without ever reaching the agency question, based on the absence of a proper summons "directed to" the airline:

> The record clearly reveals that plaintiff made no attempt to serve a summons for Gulf Air on Aviation Services or even for Aviation Services as an agent of Gulf Air. The only successful service on Aviation Services occurred . . . after the entry of an order of default. *That process was directed to Aviation Services as a defendant in plaintiff's suit, not to Aviation Services as agent for Gulf Air, a second defendant in the same suit.*

Id., 700 F.Supp. at 1414 (emphasis added). As the *LeDonne* decision demonstrates, the formal requirements for the summons and its proper service should be strictly enforced and applied according to their plain meaning, even if the court thereby loses personal jurisdiction over a party.

Contrary to these authorities, the decision of the court of appeals in this case allows the assertion of federal jurisdiction, without service of process ever having been made directly upon MLDC and without any showing that such service was even authorized

by statute or rule, simply on the grounds that service was made on MLDC's co-defendant subsidiary.[7] The confusion engendered by this departure affects not only the defendants in this case but other national and international corporations, as well as their owners, corporate parents and subsidiaries, many of which attempt to structure their business affairs and relationships with a view to where they may be subjected to suit; the predictability afforded by consistent enforcement of the federal service of process requirements is an important component of that corporate planning and structuring process. In addition to contravening the plain language and substance of Rule 4, the assertion of federal jurisdiction over MLDC and rejection of its Rule 4(j) dismissal motion in officially reported decisions has broader ramifications beyond the territorial confines of the District of Columbia, no doubt heightened by the special eminence

[7] Some courts have held that separate service on a parent corporation is unnecessary where there is no separate corporate existence, and the subsidiary is nothing more than a sham or an alter ego for the parent. See, *e.g.*, *Bally Export Corp. v. Balicor, Ltd.*, 804 F.2d 398, 405 (7th Cir. 1986). Whether such a departure from Rule 4 can be justified where the pleadings give notice that an alter ego theory is being asserted is not at issue here, since the plaintiffs themselves sued Colonial and MLDC as distinct corporate entities. The undisputed Bloomquist affidavit also specifically verified the separate existence and status of the two corporations. (App. I, 54a). Plaintiffs have never contended that either one of the defendants is a sham corporation or a mere alter ego for the other, nor have they made any effort to overcome the "presumption of corporate separateness" that exists between a parent and its wholly owned subsidiary. See *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F. 2d 902, 905 (1st Cir. 1980); *Gottlieb v. Sandia American Corp.*, *supra*, 452 F.2d at 514.

and prestige broadly accorded the federal courts sitting in the District of Columbia, all of which underscores the need for review by this Court.

As the record clearly shows, plaintiffs failed to carry their burden of establishing service of process and personal jurisdiction over MLDC.[8] There were at least three defects that preclude plaintiffs' service on Colonial Village, Inc. from being used to acquire jurisdiction over MLDC, none of which are trivial: the Colonial summons failed to identify MLDC or to specify that it was directed to Colonial as agent for MLDC in accordance with Rule 4(b); it was mailed to an attorney known by plaintiffs' counsel *not* to be authorized to receive service for MLDC under Rule 4(d)(3); and the Form 18-A acknowledgment was not returned on behalf of MLDC as required by Rule 4(c)(2)(C)(ii).

In ignoring these defects, the lower courts have indulged in precisely what this Court strongly cautioned against in *Omni Capital International*—inventing and applying a common law method for service of process not provided for anywhere in the Federal Rules of Civil Procedure or by statute. Their approach would open the door for nationwide federal service of process on a parent corporation from virtually any district where a subsidiary is amenable to service, which existing rules do not permit. As in *Omni*, creation of such a common law procedure for service should be rejected as "unwise, even if it were within [the courts'] power". 98 L.Ed.2d at 428.

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[8] "The party on whose behalf service is made has the burden of establishing its validity." 5A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL §1353, at 283 (1990) (citations omitted); see also citations at n. 5 *supra*.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment of the court of appeals.

Respectfully submitted,

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